

Supreme Court, U. S.
FILED

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MICHAEL RODAK, JR., CLERK

**IN THE
SUPREME COURT OF THE UNITED STATES**

October Term, 1976

No. 76-381

**LENA ROSA KNECHT CONLEY,
Petitioner,**

v.

**ROBERT E. HAMPTON, Chairman and
Commissioner, U. S. Civil Service
Commission, etc., et al,**

WILLIAM P. BERZAK, Chairman,

Appeals Review Board, etc., et al,

**FRANCES M. WILSON, Executive Director,
Bureau of Economic and Business Affairs,
United States Department of State, etc.,
Respondents.**

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

**LENA ROSA K. CONLEY,
300 W. 35th Street,
P. O. Box 6092,
Norfolk, Virginia 23508,
pro se.**

**Phone:
804-622-4951**

September 14, 1976.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
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FOR THE FOURTH CIRCUIT

To the Chief Justice and the Associate
Justices of the Supreme Court of the
United States:

Your petitioner, Lena Rosa Knecht Conley,
respectfully prays that a writ of certio-
rari issue to review the decisions of the
United States Court of Appeals for the
Fourth Circuit of July 28, 1976, in Nos.
75-1673 and 75-1826, and of July 12, 1976,
in No. 75-1825.

OPINIONS BELOW

The District Court on May 1, 1975, dismissed CA-74-100-N, Appendix A-1; CA-74-449-N, Appendix A-2; and CA-74-575-N, Appendix A-3.

The District Court's Memorandum Opinion and Order dated May 1, 1975, appear as Appendix A-4 through A-15.

The Court of Appeals affirmed judgment in No. 75-1673 (74-100-N) and in No. 75-1826 (74-449-N) on July 28, 1976, Appendix A-16, A-17 and A-18, and in No. 75-1825 (74-575-N) on July 12, 1976, Appendix A-19.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254, as there are SPECIAL AND IMPORTANT REASONS JUSTIFYING grant of review on writ of certiorari in the sound judicial discretion of this Court within the meaning of Rule 19 of the Rules of this Court.

QUESTIONS PRESENTED FOR REVIEW

1. a. Whether employee received the one impartial review of performance ratings in accordance with 5 U.S.C. §4305(a) and whether hearing of June 29, 1973, under 5 U.S.C. §4305(d), Appendix A-22 through A-28 (See also administrative record at 58-61) violated constitutional rights such as permitting inadmissible evidence and denying responses thereto.

b. Whether employee's performance ratings were legal in accordance with 5 U.S.C. §4307 since June 23, 1972, Rater (who testified at hearing) was supervisor for not more than 25 days (less than the required time) and there was no reviewer, nor any criticisms of employee's work prior to those voiced at hearing.

c. Whether performance rating appeal hearings must conform to statutory requirements.

2. Whether agency, Commission, and Court erred in not accepting timely appeal of July 13, 1973, coerced resignation, made in letter of July 18, 1973, Appendix A-20 & A-21 (See also administrative record at pp. 34 and 35). (Note: Administrative record at p. 18 is letter of August 15, 1973, from Navy to Congressman Whitehurst which refers to "claim that the Civilian Personnel Department forced her resignation.")

3. Whether immunity covers later sworn false statements concerning a government employee whose prior record contains proof they are untrue, violating constitutional rights.

STATUTES INVOLVED

5 U.S.C. §702. Right of review. A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 U.S.C. §4305. Review of ratings. (a) An agency, on request of an employee of that agency, shall provide one impartial

review of the performance rating of the employee.

(b) . . . If an employee with a current performance rating of satisfactory has not requested and obtained review of the rating under subsection (a) of this section, he is entitled, on written appeal to the chairman of the appropriate board of review established under subsection (b) of this section, to a hearing and decision on the merits of the appealed rating.

(d) At the hearing the appellant. . . and agency... are entitled . to hear or examine, and reply to, information submitted by others.

Federal Personnel Manual, Supplement, 752-1, Subchapter SI-2(b)(1); (b). Involuntary actions. (1) Employee deceived. Agencies should be particularly cautious about assuring an employee that a voluntary separation, as opposed to a removal for cause, will leave his record unblemished. *** Thus, if an employee is influenced to separate voluntarily because of his agency's assurance that this action will leave him with a clear record in his Official Personnel Folder and if the agency then enters any unfavorable information on the SF 50, the agency has deceived the employee.

Administrative Procedure Act of 1946, 60 Stat. 237, 5 U.S.C.A. 1001.

STATEMENT OF THE CASE

Due process and equal justice under the law have been denied petitioner each step taken to clear record, without being able to secure any legal assistance. Only faith in God has made possible this timely petition.

There has yet to be one impartial review of performance ratings. (Note: June 1972 Bater (no Reviewer) was on his way to Vietnam and returned in time to be a witness June 29, 1973, but petitioner was denied opportunity to respond to his remarks.

That the Board was arbitrary in its rulings and capricious in accepting inadmissible statements, denying due process, is evident from reading REPORT OF DECISION, Appendix A-22 through A-28.

Timely appeal was made in reporting coerced nature of July 13, 1973, resignation, particularly in letter of July 18, 1973, to Naval Supply Center, Appendix A-20 and A-21.

McCormack v. U.S., Ct.Cl. No.434-72, May 15, 1974, makes clear "The plaintiff did take action to put the Government on notice that the plaintiff viewed the 'resignation' as an adverse action. At this point, the Government, while it need not acquiesce in plaintiff's view, must at least inform the plaintiff of the administrative rights attaching to an involuntary resignation. If the Government, does not, after it knows, or should know, that the plaintiff is contending that his resignation was involuntary, come forward and explain that a true involuntary resignation gives rise to hearing rights, then the rule that the delay in appeal will be excused becomes applicable."

Note a letter to Congressman Whitehurst July 17, 1973, referred to coerced resignation and was promptly referred to the Commission which took no action. (See

administrative record at p. 34.)

The agency compounded its wrongdoing by placing on the resignation a derogatory remark not discovered by petitioner until September 27, 1973! This adverse action rendered the resignation doubly involuntary!

In the third case, the Government orders a sworn statement submitted to Court as of December 11, 1974, made doubly ridiculous by the NOTICE OF DECISION which found petitioner "high" in the Satisfactory category in a GS-4 position (Appendix A-28), claiming the same individual performed work (upon recuperating from major surgery) subsequently assigned to GS-3! Personnel evaluation April 22 through December 31, 1965, Appendix A-39 and A-40, shows work performed at levels of GS-5 and GS-8! How tragic the Government refused opportunity for employee to perform work at level to which recruited from graduate school, GS-5, Step 10!

REASONS FOR GRANTING WRIT

Problems with resignations are outlined on pages II-14 through II-18 of THE SPOILED SYSTEM. A Call for Civil Service Reform by Robert Vaughn, Copyright 1972 by Public Interest Research Group. It includes statement of Executive Director Bernard Rosen of the Civil Service Commission that "the practice of entering a notation that the resignation or retirement was submitted rather than face dismissal was no longer tolerated. Although a notation may no longer appear on the resignation forms, the management of the agency can provide the information when consulted

by potential employers." This may have happened to petitioner as the Commanding Officer, Naval Supply Center, on October 27, 1973 (See administrative record at 23) wrote: "... to insure that a person outside of the Naval Supply Center does not place an erroneous interpretation on the notation, it has been completely obliterated from the SF-52 (your resignation)" leaving opportunity to provide adverse false information to inquirers.

The performance rating system has been under criticism for years serving as formality while "ghost" files provide management's true evaluations.

In the third case, "It may well be that the immunity doctrine has now been extended too far," as analyzed by Judge Learned Hand in Gregoire v. Biddle, 177 F.2d 579; a full investigation is past due.

Petitioner may be presumptuous but feels this case might be one where "The Commission should undertake a thorough and comprehensive study of the subsequent history of successful appellants, EEO complainants, and reinstated employees. Included in such a study should be a systematic review of coercion, reprisal or retaliation which might have been taken against appellate witnesses or against agency employees." The Commission responded to this Recommendation 7 on page 195 of Hearings in 1972, 92nd Congress, Serial No. 92-54, that it will "(1) assure that the proscription against coercion, reprisal and retaliation is

clearly reemphasized in policy issuances;
(2) provide for effective dissemination of
this policy to management officials and
employees, so that violations may be brought
promptly to the attention of the Commission;
and (3) pursue rigorous enforcement...."

In the administrative record, which was
not provided petitioner by the District
Court until too late for proper response,
there are many illegal statements, inserted
without due process. It is impossible to
list in detail under present time pressure.

Nor is it possible at this time to again
correct the many inaccurate statements in
the District Court's memorandum.

CONCLUSION

Wherefore, the premises considered,
petitioner believes there are special and
important reasons justifying grant of a
writ of certiorari in her case.

Respectfully submitted,

Lena Rosa K. Conley
Lena Rosa K. Conley,
pro se.

COMMONWEALTH OF VIRGINIA
CITY OF NORFOLK

Subscribed to and sworn before me this
13th day of September, 1976.

M. J. Brownson

Notary Public

My Commission Expires
January 9, 1977.

CERTIFICATE OF SERVICE

I hereby certify that three printed
copies of the Petition for a Writ of
Certiorari are being delivered to the
office of:

The Solicitor General,
Department of Justice,
Washington, D. C. 20530.

Lena Rosa K. Conley
Lena Rosa K. Conley,
pro se.

September 14, 1976.

APPENDIX

JUDGMENT ON DECISION BY THE COURT
CIV 32 (7-63)

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

Civil Action File No. 74-100-N

Lena Rosa Knecht Conley)
vs.)
ROBERT E. HAMPTON, Chairman and) JUDGMENT
Commissioner, U.S. Civil Service)
Commission, and Welford M. Burrell)
Chairman, Performance Rating)
Board of Review, and V.A. Lascara,)
Rear Admiral, SC, USN.)

This action came on for hearing before the Court, Honorable RICHARD B. KELLAM, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that the defendants' motion for summary judgment is granted and this action is dismissed.

Dated at Norfolk, Virginia, this 1st day of May, 1975.

W. FARLEY POWERS, JR.
Clerk of Court

By /s/ Dorothy K. Johnson
Dorothy K. Johnson
Deputy Clerk

A TRUE COPY, TESTE:
W. Farley Powers, Jr., Clerk
By /s/ Dorothy K. Johnson
Deputy Clerk

JUDGMENT ON DECISION BY THE COURT
CIV 32 (7-63)

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

Civil Action File No. 74-449-N

Lena Rosa K. Conley

vs.

William P. Berzak, Chairman,
Appeals Review Board, United
States Civil Service Commission;
Thomas O. Renn, Director, Civilian
Personnel Department, Naval Supply
Center, and Leroy W. Powers, Water
Freight Division, Freight Terminal
Department, Naval Supply Center

JUDGMENT

This action came on for hearing before the Court, Honorable RICHARD B. KELLAM, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that plaintiff has not exhausted her administrative remedies as required by law and her complaint is dismissed.

Dated at Norfolk, Virginia, this 1st day of May, 1975.

W. FARLEY POWERS, JR.
Clerk of Court

By /s/ Dorothy K. Johnson
Dorothy K. Johnson
Deputy Clerk

A TRUE COPY, TESTE:
W. Farley Powers, Jr., Clerk
By /s/ Dorothy K. Johnson
Deputy Clerk

JUDGMENT ON DECISION BY THE COURT
CIV 32 (7-63)

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

Civil Action File No. 74-575-N

LENA ROSA K. CONLEY, Plaintiff,

vs.

FRANCES M. WILSON, Executive Director, Bureau of Economic and Business Affairs, United States Department of State, Defendant.)

JUDGMENT

This action came on for hearing before the Court, Honorable RICHARD B. KELLAM, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that the defendant's motion to dismiss or in the alternative for summary judgment is **SUSTAINED** and the complaint is dismissed.

Dated at Norfolk, Virginia, this 1st day of May, 1975.

W. FARLEY POWERS, JR.
Clerk of Court
/s/ Jean C. Basnight
Deputy Clerk

A TRUE COPY, TESTE:
W. Farley Powers, Jr., Clerk
By /s/ Jean C. Basnight
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

LENA ROSA KNECHT CONLEY,)
Plaintiff,) CIVIL ACTION NOS.
v.) 74-100-N
ROBERT E. HAMPTON, etc.,) 74-449-N
et al,) 74-575-N
Defendants.)

MEMORANDUM OPINION AND ORDER

The plaintiff has filed numerous pro se complaints against various employees and officials of the United States government. All defendants have moved to dismiss or in the alternative for summary judgment. The subject matter of each case, as well as our rulings on the various motions, will be discussed below. It appears, however, that each case arises out of the same set of facts and circumstances that were previously discussed in the Memorandum Opinion of February 3, 1975, Conley v. Hampton, C/A 74-100-N, 74-236-N, 74-449-N, 74-450-N (E.D. Va. 1975). For the purposes of this opinion the relevant facts are reiterated.

Mrs. Conley was employed as a secretary in the State Department. In November, 1966, she underwent a psychiatric examination and was declared medically unfit for future employment.* She was retired on disability status.* In January, 1971, Mrs Conley was declared recovered and was employed at the Naval Supply Center (NSC), Norfolk, Virginia, on July 21, 1971.* Her employment was on a probationary status,* and in January, 1972, her employment at NSC was made permanent.

*These statements are inaccurate. LRKC

In April, 1972, Mrs. Conley's work was evaluated as Satisfactory. Mrs. Conley objected to the Satisfactory rating and refused to initial the evaluation form, but did not appeal the rating. In April, 1973, Mrs. Conley was again given a Satisfactory rating, to which she again objected. This time, however, she appealed the rating. In June, 1973, the Local Board upheld the satisfactory rating, and on August 7, 1973, the Performance Rating Board of Review did likewise.*

In the meantime some differences had arisen between Mrs. Conley and her supervisors at NSC, and she resigned from her job on July 13, 1973. In November, 1973, Mrs. Conley wrote to Mr. Burrell of the Performance Rating Board regarding her Satisfactory rating. In this letter she mentioned for the first time*that she felt coerced into resigning her position at NSC. No action appears to have been taken on this letter. In another letter dated April 20, 1974, (1/There are some discrepancies between the dates mentioned here and those mentioned in our opinion of February 3, 1975. The dates mentioned in this opinion are believed to be the correct dates.) Mrs. Conley wrote to the Regional Board in Philadelphia, Pennsylvania, requesting a review of her charge that she was coerced into resigning from NSC. In a letter from the Regional Board dated May 14, 1974, the Board indicated that Mrs. Conley's appeal was filed beyond the time limit set by Civil Service regulations, but that upon a showing of good cause for her tardiness the Board would waive the time requirements. Mrs. Conley

*These statements are inaccurate. LRKC

sent her reasons in two letters dated May 22 and 23, but on May 31, the Board ruled that her reasons were insufficient. Her appeal was, therefore, untimely and not to be considered on the merits. This decision was appealed to the Board of Appeals and Review in Washington, D. C., which on September 20, 1974, upheld the decision of the Regional Board.

We now turn to the three complaints before the Court.

C/A 74-575-N

In this action, Mrs. Conley has sued Frances M. Wilson, Executive Director, Bureau of Economics and Business Affairs, United States Department of State, for an alleged defamatory statement made in an affidavit the subject of which was Mrs. Conley's work history. The alleged defamatory statement regarded Mrs. Conley's temporary*retirement for medical reasons. Mrs. Conley contends that the statement was untrue, and was made with actual malice to do her harm. For the reasons stated more fully in our opinion of February 3, 1975, governmental officials enjoy an absolute immunity for statements made by them within the line of duty. Barr v. Matteo, 360 U.S. 564, 575 (1959); Berndtson v. Lewis, 465 F.2d 706 (4th Cir. 1972); Fromm-hagen v. Glazer, 442 F.2d 338 (9th Cir. 1971); Ruderer v. Meyer, 413 F.2d 175 (8th Cir.), cert. denied, 396 U.S. 936 (1969); Chafin v. Pratt, 358 F.2d 349 (5th Cir.), cert. denied, 385 U.S. 878 (1966); Pagano v. Martin, 275 F.Supp. 498 (E.D. Va. 1967), aff'd., 397 F.2d 621 (4th Cir. 1968), cert. denied, 393 U.S. 1022 (1969).

*This statement is inaccurate. LRKC

Only by showing that the statements were not made in the line of duty can Mrs. Conley hold the defendant liable. Since the very affidavit upon which Mrs. Conley bases her complaint states that Ms. Wilson was acting within her line of duty, Mrs. Conley is required to place counter affidavits before the Court or possibly suffer summary judgment against her. See Howard v. Lyons, 360 U.S. 593, 597 (1959); Chafin v. Pratt, supra at 354 n. 13; Preble v. Johnson, 275 F.2d 275, 279 (10th Cir. 1960); F.R.Civ.P. 56(e). Our opinion of February 3, informed Mrs. Conley of this duty, yet she did not challenge the line of duty issue in her reply brief filed in this case on March 24, 1975. Accordingly, we have no choice but to presume that the defendant was acting in the line of duty, and the complaint against her is hereby DISMISSED.

C/A 74-100-N

In this action, Mrs. Conley has sued for a judicial review of the administrative determination that her appeal was not filed in a timely manner. Mrs. Conley alleges that the decision was arbitrary, capricious, and an abuse of discretion; that the required administrative procedure was not followed; and that she was denied due process. See 5 U.S.C. §706(a)(A), (B), and (D). At a hearing on January 10, 1975, it was agreed that all of these issues would be decided upon the administrative record. Before we turn to the record, however, the defendants have interposed two objections to the Court's jurisdiction that must be disposed of preliminarily.

The first objection is that the Administrative Procedure Act, 5 U.S.C. §701 et seq.

is not a statute which confers jurisdiction upon the Court. E.g., Zimmerman v. United States, 422 F.2d 326, 330-31 (3d Cir.), cert. denied, 399 U.S. 911 (1970); Opelika Nursing Home, Inc. v. Richardson, 356 F. Supp. 1338 (M.D. Ala. 1973). We agree with this contention and the case law makes this point abundantly clear. It is equally clear, however, that jurisdiction may be conferred merely by alleging one of the traditional jurisdictional statutes contained in Title 28 in conjunction with 5 U.S.C. §701 et seq. See Opelika Nursing Home, Inc. v. Richardson, supra, in which the plaintiff pleaded 28 U.S.C. §1331 in addition to 5 U.S.C. §701 et seq. Reading Mrs. Conley's pro se complaint liberally, as we are required to do, we note that in some of her other petitions which are related to this one Mrs. Conley has pleaded either 28 U.S.C. §1331 or §1332, alleging damages in excess of \$10,000.00. It would be a mere formality to require Mrs. Conley to amend her pleading in C/A 74-100-N since the Court is fully aware that an independent ground of jurisdiction is alleged in other related cases. The technical defect of the pleadings is not fatal under these circumstances.

The defendants have also argued that 5 U.S.C. §701(a)(2) prohibits court review of agency actions that are discretionary in nature. We agree that this is true in most instances. Exceptions exist to this general premise, however, and discretionary action may be reviewed where it is alleged that the action was arbitrary, capricious, or an abuse of discretion. Reece v. United States, 455 F.2d 240, 242 (9th Cir. 1972); Bell Lines, Inc. v. United States, 306 F. Supp. 209, 213 (S.D. W.Va. 1969), aff'd., 397 U.S. 818 (1970). The discretionary

action may also be reviewed to assure that required procedures have been adhered to. The review is not of the discretionary action itself, but merely of the procedure followed. East Oakland-Fruitvale Planning Council v. Rumsfeld, 471 F.2d 524, 534 (9th Cir. 1972). The substance of Mrs. Conley's complaint is that the decision declaring her appeal untimely was arbitrary, capricious, an abuse of discretion, and was contrary to required agency regulations. Thus, assuming that the action taken was discretionary, it may be reviewed regarding the issues raised by Mrs. Conley. We may also review the administrative record to insure that Mrs. Conley was not denied any of her constitutional rights. See Campaign Clean Water, Inc. v. Train, 489 F.2d 492, 498 (4th Cir. 1973), cert. granted, 416 U.S. 969 (1974). We hasten to point out that none of the above permits the Court to go so far as to review the merits of the decision which found Mrs. Conley's appeal untimely. (2/Thus, we are precluded from reviewing the decision to see if it is based upon substantial evidence.) We may only examine the circumstances surrounding the decision to insure that constitutional requirements were followed, civil service procedure was adhered to, and that the decision was not a patent abuse of discretion.

Civil Service regulations gave Mrs. Conley fifteen days from the date of her resignation to raise the issue that she felt coerced her into resigning. See 5 C.F.R. §752.204(a). There is no contention that she filed her appeal within this time. After the fifteen days, the appeal will be heard, at the discretion of the Board, upon a showing that the aggrieved party was not aware of the right to appeal but nevertheless exercised

due diligence in an attempt to further his claim, or where the aggrieved party did not appeal due to circumstances beyond his or her control. See generally Administrative transcript at 3-4; 5 C.F.R. §752.204(b).

A reading of the rather extensive Administrative Record establishes that the decision holding Mrs. Conley's appeal untimely was not arbitrary, capricious, or an abuse of discretion. It appears that both the Regional Board and the Board of Appeals and Review examined Mrs. Conley's reasons for not filing her appeal within fifteen days, and considered them to be without merit. (3/For the reasons given by Mrs. Conley see the Administrative Record at 72 and 66. For the decision by the Regional Board see the Record at 64. For the decision of the Board of Appeals and Review see the Record at 3.) The Court is not permitted to second-guess the propriety of this decision. The review is limited to insuring that Mrs. Conley's reasons were given full consideration, and having found that they were, this aspect of Mrs. Conley's complaint is without merit.

The Civil Service regulations were followed. Not one instance is shown where any procedural requirement was not strictly followed in the handling of Mrs. Conley's appeal. Accordingly, this aspect of Mrs. Conley's complaint in C/A 74-100-N is also without merit.

Regarding Mrs. Conley's claim that she was denied due process, while she does not state which specific occurrences constitute the alleged denial we have perused the record with an open mind and find no facts which would constitute a constitutional deprivation. The mere fact that a limit was set within which Mrs. Conley had to appeal is certainly not improper. In fact, since a late appeal

is not denied without considering the reason for the lateness, the rule is more lenient than the filing requirements in the federal courts. E.g. Moran v. L. F. Fales Machine Co., C/A. 74-302-N (E.D. Va. March 27, 1975) (filing complaint twenty-one days late requires automatic dismissal); Zeller v. Folsom, 250 F. Supp. 615 (N.D. N.Y. 1956) (filing administrative appeal one day late requires automatic dismissal). The fact that Mrs. Conley was never given a hearing at which she could be physically present does not constitute a denial of due process as the record indicates that the decision was based entirely upon submitted written argument, and Mrs. Conley was given every opportunity to communicate her position to the two Boards involved. In fact, she availed herself of these opportunities and did present her side of the argument. See Administrative Record at 72, 66 and 62. The last possible due process objection is that Mrs. Conley was not given notice of her right to raise the issue of her resignation being coerced. This is without merit, however. The cases requiring that "notice" be given are inapplicable here. Goss v. Lopes, _____ U.S. _____ (1975); Goldberg v. Kelly, 397 U.S. 254 (1970). Both Goss and Goldberg involved administrative actions instituted against the plaintiffs, actions which required that they knowledgeably respond or suffer the consequences of a default. In Mrs. Conley's case the lack of notice was that she was not informed of her affirmative right to allege coercion in her resignation. To rule that this lack of notice denies due process is to hold that a potential plaintiff has a constitutional right to be informed of a possible cause of action. Such is not the law. (4/Mrs. Conley's case would be analogous to Goss or Goldberg if she had been fired and not informed of

her right to appeal the decision. In that case, her employer would have instituted the type of action that would require a knowledgeable response, and he would have a duty to inform her of a right to appeal.)

Accordingly, the defendants' motion for summary judgment in C/A 74-100-N is hereby GRANTED.

C/A 74-449-N

In this action Mrs. Conley has sued Mr. Berzak, the Chairman of the Board of Appeals and Review, and three employees at NSC, for coercing her into resigning. Mrs. Conley has sued for reinstatement with back pay in the amount of approximately \$15,000.00. The defendants have moved to dismiss or in the alternative for summary judgment.

Mrs. Conley based this action upon 28 U.S.C. §1361 and 28 U.S.C. §1331. Under §1361 she sought a writ of mandamus to compel Mr. Berzak to reinstate her with back pay of \$15,000.00. Under §1331 she alleged that her coerced resignation was in violation of her constitutional rights and that she has been damaged in the amount of \$15,000.00. In opposition to this the defendants have successfully argued that this is a suit against the Federal government, and jurisdiction cannot be predicated upon either §1361 or §1331. Richardson v. United States, 465 F.2d 844 (3rd Cir. 1972); Beale v. Blount, 461 F.2d 1133 (5th Cir. 1972); McClendon v. Blount, 452 F.2d 381 (7th Cir. 1971); Massachusetts v. Connor, 248 F.Supp. 656 (D. Mass.), aff'd. per curiam, 366 F.2d 778 (1st Cir. 1966). The appropriate jurisdictional basis for Mrs. Conley's suit is 28 U.S.C. §1346. Rather than require Mrs. Conley to amend her pleadings before continuing with

the case, we will treat her complaint as if it had been properly pleaded in the first instance. (5/Mrs. Conley would have to bring suit in the district court for \$10,000.00 or less, or in the court of claims for an amount in excess of \$10,000.00. She could not, as she has done here, sue in the district court for \$15,000.00. Since the money sought is pay, there is also some question whether the district court could do anything but order reinstatement. See 28 U.S.C. §1346 (d)(2) and compare McClendon v. Blount, 452 F.2d 381, 383 (7th Cir. 1971) with Paroczay v. Hodges, 219 F.Supp. 89, 93 (D.D.C. 1963).)

Assuming correct pleadings, the defendants argue that Mrs. Conley is precluded from litigating the voluntariness of her resignation because she has not exhausted her administrative remedies. We agree with this contention and dismiss the complaint on that basis.

It is well settled that the failure of an employee of the Federal government to exhaust his administrative remedies prevents him from litigating the issue in the Federal courts. Beale v. Blount, supra at 1139-40; Gernand v. United States, 412 F.2d 1190 (Ct.Cl. 1969); McDougall v. United States, 149 F.Supp. 651 (Ct.Cl. 1957). One extreme of this principle is exhibited in Beale v. Blount in which the plaintiff never filed a complaint with the Civil Service Commission. Instead, he went directly to the Court of Claims. The Court did not hesitate in dismissing the complaint for failure to exhaust administrative remedies. In Mrs. Conley's case, however, she did file an appeal even though it was later determined to be untimely. In instances such as these, the Court has the duty to examine the decision

declaring the appeal untimely to insure that it is based upon substantial evidence. We feel that it was in this case.

The decision most favorable to Mrs. Conley is Gernand v. United States, 412 F. 2d 1190 (Ct.Cl. 1969), and even it is not enough to justify a reversal of the administrative finding below. In Gernand, the plaintiff alleged that her termination was illegal, but she did not complain to the Civil Service Commission until more than two years after leaving her job. The Commission decided that the complaint was clearly outside of the ten day filing deadline and was therefore untimely. They declined to reach a decision on the merits much the same as the Board of Appeals and Review declined to reach the merits of Mrs. Conley's case. Mrs. Gernand then sued in the Court of Claims to litigate the legality of her termination. The Court noted that it had often held that an untimely appeal constituted a failure to exhaust an administrative remedy. However, in Mrs. Gernand's case the facts showed that within five days of her termination she had written a letter to President Kennedy requesting assistance in challenging her illegal termination. This letter was forwarded to the Civil Service Commission which did not act upon the complaint. The Court concluded that even though Mrs. Gernand did not directly notify the Commission in time, she did, within the ten day limit, indicate that she had a complaint and this was passed on to the Commission. The Commission, thereby, had notice of Mrs. Gernand's grievance. Accordingly, the Court ruled that her appeal was timely and ordered that she be given a trial to determine the legality of her termination.

We note that after Mrs. Conley resigned she did write to Congressman Whitehurst. Examination shows, however, that the letter was not written until August 27th (44 days after her resignation) and it only dealt with Mrs. Conley's dissatisfaction with her Satisfactory rating. The letter was written long after the 15 day deadline and did not complain of a coerced resignation. See Administrative Record at 89, paragraph 2. The Regional Board considered the contents of this letter as perhaps indicating a grievance regarding her resignation and found that it did not. See Administrative Record at 65. We feel this finding was correct, and the decision holding Mrs. Conley's appeal as being untimely is clearly supported by substantial evidence.

Accordingly, we find Mrs. Conley has not exhausted her administrative remedies as required by law, and C/A 74-449-N is hereby DISMISSED.

/s/ Richard B. Kellam
United States District Judge

Norfolk, Virginia

May 1st, 1975.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 75-1673

Lena Rosa Knecht Conley, Appellant,

-versus-

Robert E. Hampton, Chairman
and Commissioner U. S. Civil
Service Commission, etc., and
Welford M. Burrell, Chairman Per-
formance Rating Board of Review, etc.,
and V. A. Lascara, Rear Admiral, SC,
USN, Commanding Officer, Naval
Supply Center, etc., Appellees.

No. 75-1826

Lena Rosa K. Conley, Appellant,

-versus-

William P. Berzak, Chairman,
Appeals Review Board, United States
Civil Service Commission, etc.,
Thomas O. Renn, Director, Civilian
Personnel Department, Naval Supply
Center, etc., Marlin W. Eby, Director,
Employee Relations and Services Division,
Civilian Personnel Department, Naval
Supply Center, etc., Leroy W. Powers,
Water Freight Division, Freight Terminal
Department, Naval Supply Center, etc.,
Appellees.

Appeals from the United States District
Court for the Eastern District of Virginia,
at Norfolk. Richard B. Kellam, District
Judge.

Submitted: February 25, 1976.

Decided: July 28, 1976

Lena Rosa Knecht Conley, Pro Se, Appellant;
J. Brian Donnelly, Assistant United States
Attorney, for Appellees in No. 75-1673,
and Roger T. Williams, Assistant United
States Attorney, for Appellees in No. 75-
1826.

PER CURIAM:

Lena Rosa K. Conley resigned as
a civilian employee of the Department of
the Navy on July 13, 1973. In November of
1973, she wrote Mr. Burrell of the Perform-
ance Rating Board, mentioning for the first
time that she felt that she was coerced
into resigning. On April 20, 1974, Mrs.
Conley wrote the Regional Board of the
Civil Service Commission requesting a re-
view of her charge of coercion. The Re-
gional Board informed her that her appeal
was untimely, and invited her to submit
facts showing good cause for her delay.
Mrs. Conley did so, but the Regional Board
ruled on May 31, 1974, that her reasons
were insufficient. This ruling was upheld
by the Board of Appeals and Review on
September 20, 1974.

In No. 75-1673, Conley is seeking
judicial review of the administrative deter-
mination that her appeal was not timely.
She alleges that the decision was arbitrary,
capricious, an abuse of discretion, and
furthermore that she was denied due process.
A review of the record reveals that all
procedural requirements were followed by
the government. 5 C.F.R. § 752.204(a) pro-
vides that an appeal following termination
must be filed within fifteen days. 5 C.F.R.
§ 752.204(b) allows the Board in its dis-
cretion to waive the fifteen-day limit.

Both the Regional Board and the Board of Appeals and Review considered Conley's reasons for late filing, and found no merit in any of them. As noted by the District Court, due process does not require that one be notified in such a case of the right to raise the issue of coercion. Therefore, the granting of summary judgment for defendant was proper.

In No. 75-1826, Conley seeks damages in the amount of \$15,000 against the Chairman of the Board of Appeals and Review and three employees of the Naval Supply Center for allegedly coercing her into resigning. Since the action for reinstatement and back pay against the United States, jurisdiction was lacking under 28 USC 1331 and 1361. The District Court treated it as a claim under 28 USC 1346, noting that she could not sue for more than \$10,000; furthermore, 28 USC 1346(d)(2) empowers the District Court to award only reinstatement since the money sought is backpay. In any event, dismissal was proper due to Conley's failure to exhaust her administrative remedies. It is well-settled that an untimely appeal to the Civil Service Commission constitutes a failure to exhaust administrative remedies. Gernand v. United States (Ct. Cl. 1969) 412 F.2d 1190, 1191, cert. denied 414 U.S. 844 (1973), reh. denied 414 U.S. 1017 (1973). Accordingly, the holding of the District Court is affirmed.

The judgments of the District Court are accordingly

A F F I R M E D.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 75-1825

Lena Rosa K. Conley, Appellant,

-versus-

Frances M. Wilson, Executive
Director, Bureau of Economic
and Business Affairs, United
States Department of State, etc., Appellee.

No. 76-1078

Lena Rosa K. Conley, Appellant,

-versus-

Essie B. Sawyer, Appellee.

Appeals from the United States District
Court for the Eastern District of Virginia,
at Norfolk. Richard B. Kellam, District
Judge.

Submitted: February 25, 1976.

Decided: July 12, 1976

Before RUSSELL, FIELD and WIDENER, Circuit
Judges.

Lena Rosa K. Conley, Pro Se, Appellant;
Roger T. Williams, Assistant United States
Attorney, for Appellees.

PER CURIAM:

These are libel actions brought by Lena Rosa K. Conley, a former employee of the Naval Supply Center at Norfolk, against a State Department Official and the secretary to the Personnel Officer of the Naval Supply Center. An examination of the record reveals that the allegedly libelous statements were clearly in the line of the defendants' duty, and thus enjoy absolute immunity. Barr v. Matteo (1959) 360 U.S. 564, 575.

The judgments of the District Court
are

AFFIRMED.

300 W. 35th Street
(or P.O. Box 6092)
Norfolk, Va. 23508
July 18, 1973

Civilian Personnel Department
Code 21.2
Naval Supply Center
Norfolk, Virginia 23512

Gentlemen:

Please consider me an applicant for the position of COMPUTER OPERATOR GS-332-4,5, 6,7 (TRAINEE), as given in ANNOUNCEMENT NO. 47-73.

Attached is Standard Form 171, updated from its submission in February 1973, when assistance was requested to return to former status of GS-5, Step 10. Entering a new field may hasten this process.

Transcript of college work, showing award of B.A. in Sociology (HONORS) in June 1961 by Old Dominion University, is attached.

Successful or acceptable scores were made on the Law School Admission Test taken on April 14, 1973.

I was told my request of July 12, 1973, for continued leave without pay pending action regarding the \$12,023.49 check not yet in hand, was denied, as was also the opportunity to talk to a higher official. My request of July 9, 1973, of Mr. M. W. Eby for reassignment where rater and reviewer would not be CDR Risinger, CAPT Clark, or LT Ott, was also denied.

I have written Members of Congress to inquire if there is any justification for the dissatisfactions expressed in the resignation I felt forced to submit July 13, 1973, to avoid further unpleasantness. It is hoped this action will not prejudice consideration of my application, at the conclusion of which return of enclosures is requested.

Very truly yours,

/s/ Lena Rosa K. Conley

Lena Rosa K. Conley
(Mrs. George W. Conley)

Enclosures:
SF 171 with continuation sheet
and 11 attachments
5-page ODU Transcript

Barely Legible Copy Received 8-20-73
Lena Rosa K. Conley

OFFICE OF THE CHAIRMAN
311 Rotunda Building PH:A0:WMB
415 St. Paul's Blvd.
Norfolk, Virginia 23510 DOCKET#: 73-38

**PERFORMANCE RATING
BOARD OF REVIEW**

7 AUG 1973
Naval Supply Center
Norfolk, Virginia 23512

NOTICE OF DECISION

Appellant: Mrs. Lena R. Conley
Position: Clerk-Stenographer
GS-312-4
Organization: Freight Terminal Department
Water Freight Division

Performance Rating Period: April 1
1972 through March 31, 1973.
Rating Appealed: Satisfactory
Rating Desired: Outstanding
Rating Determined: Satisfactory

Date of Hearing: June 29, 1973

Board of Review Members:
Welford M. Burrell, Chairman
George D. Eastes, Employee Member
Thelma W. Jones, Management Member

Employee Representative:
Joseph A. Jordan, Jr.
Attorney at Law

Department Representative: Brian W. Bowler

Witnesses: Captain J.E. Clark, U.S. Army
(Rating Official)
Commander R.E. Risinger U.S. Navy
(Reviewing Official)

SUMMARY AND ANALYSIS

After careful consideration of all the facts and information obtained during the hearing and otherwise submitted in this case, the Board finds:

**REGARDING THE APPELLANTS' REQUEST FOR
A STENOGRAPHIC REPORT OF THE HEARING**

1. The appellant by letter of May 25, 1973, requested a stenographic report of the hearing "---as they may be helpful in other court action contemplated with regard to employment prior to my assignment to the Naval Supply Center, Norfolk."

2. Subpart D, Section 430 (C) of Part 430 of the Civil Service regulations provides:

"A stenographic report of an oral hearing shall be required only when the Board unanimously votes it necessary to the best interests of the Government and the employee."

3. The Board's responsibility and authority in this case was limited to providing the appellant with an opportunity to present evidence concerning her appeal; consider the evidence; and decide whether to, (1) raise the assigned rating or (2) sustain the assigned rating. Considering the reasons for the request, the Board was unanimous in determining that a stenographic report was not necessary to the best interest of both parties to the appeal.

**REGARDING THE REQUEST FOR CONSIDERATION OF
AN APPEAL FROM THE RATING ASSIGNED FOR THE
PERIOD JULY 12, 1971 THROUGH MARCH 31, 1972.**

1. In her appeal of April 20, 1973, the appellant requested that the applicable time limit be waived and that the Board consider an appeal from the "Satisfactory" performance rating assigned for the period July 12, 1971, to March 31, 1972. As a basis for that request, the appellant contended she had received misinformation from the rating official and the Civilian Personnel Office. She also noted that she underwent extensive physical tests for a substantial length of time subsequent to assignment of that rating and thus was restricted in pursuing the appeal.

2. Upon considering this request the Board noted the following statements in the appellants letter of April 20, 1973:

"Because I intended to appeal last year's rating, I found myself being--."

3. In a memorandum dated June 22, 1973, Mrs. Mildred Oliver of the Civilian Personnel Department stated:

"a. Approval dates for all performance ratings and appeal information is always published in the house newspaper "The Supply Chest", which goes to each employee. In addition, information regarding approval dates also is published in the bi-weekly "Today's News Today".

"b. Mrs. Conley contacted me shortly after the publication of the Supply Chest regarding appeal rights. I informed Mrs. Conley of the appeal procedures and offered assistance. I remember the call

because Mrs. Conley made a statement to the effect that she thought she would resign rather than appeal the rating. Mrs. Conley did not come to see me nor did she call."

4. Lt. Ott, who was the rater for the period in question, informed the Board that he was the most logical person to assign the rating and that he did so in good conscience with a full understanding of the fact that he could have assigned an "Outstanding" rating if he felt one was warranted.

5. Taking note of the foregoing circumstances in conjunction with the fact that the notice of rating fully informed the appellant of her appeal rights and the applicable time limit, the board determined that the appellant did not provide sufficient reasons for it to waive the regulatory time limit and consider the belated appeal of the rating for the period July 12, 1971 through March 31, 1972. While she may have had a health problem during that time, there is no indication that she was incapacitated to the extent that she had to wait 10 months to indicate an appeal.

REGARDING THE TIMELY APPEAL OF THE
PERFORMANCE RATING FOR THE PERIOD
APRIL 1, 1972 THROUGH MARCH 31, 1973

1. During the rating period involved, the appellant was employed in the Freight Terminal Division, Water Freight Department, Naval Supply Center, Norfolk, Virginia. She worked in the position of Clerk-Stenographer, GS-312-4. Both the rater, Captain J. E. Clark and the reviewer, Commander R. E. Risinger were present at the hearing and

provided information to support the "Satisfactory" rating assigned.

2. It was agreed that position description No. 402-165 was generally accurate and reflected duties performed during the rating period. However, it was noted that there were additional duties performed which were not reflected in the position description. The performance of such duties was recognized by the Board and considered in its deliberations.

3. The performance requirements for an "Outstanding" rating are set forth in NSC Norfolk, Virginia Instruction 12430.2 J dated March 19, 1973. The subject requirements identify three major aspects of performance; namely: a. Quality of Work; b. Quantity of Work and c. Adaptability.

4. The Board found Mrs. Conley's work to be satisfactory under the factor "Quality of Work". She brought out that she performed various duties within short time frames, finished and submitted reports on time, updated manuals, simplified procedures, reduced time for making Servmart purchases and reduced "on hand" office supplies to quantities needed. The reviewer testified that he relies on the appellant for the format used in correspondence and that there has, on occasion, been criticism for the format used. While both supervisors acknowledged that her work was of excellent quality, there was no indication that she achieved quality standards which exceeded those normally expected to the extent that an "outstanding" rating was warranted.

5. Under the factor "Quantity of Work" the Board found the appellant's work to be "Satisfactory". Mrs. Conley's typing speed (90 wpm) and her ability to take dictation (175 wpm) was found to be outstanding since both exceeded normal requirements. However, the testimony developed at the hearing indicated that with one exception there was a minimal requirement for dictation during the rating period. That exception was the requirement that she take verbatim records of conversations during operation "Pegasus". The appellant maintains that the volume of work in her job far exceeds that of the average Clerk-Stenographer. To compensate, she stated she combines errands with her lunch hour, starts work early and leaves late. The rater and reviewer noted that the job is demanding, with backlogs expected and accepted as normal. They indicated that the appellant rarely required help and that she did an outstanding job of purging cumbersome files and eliminating a heavy backlog of filing. The Board noted that the backlog existed and was eliminated during a period outside the rating period. The volume of work performed was not viewed by the Board to be in excess of that normally required in a job which by its very nature requires work at a steady pace with rare instances of lulls in the amount of work to be done. It was also indicated that the appellant did not always complete "hot" correspondence on time and that she occasionally had to be asked to re-establish her priorities to get such work out on schedule.

6. With regard to the element "Adaptability", the appellant was found to be "Satisfactory". The appellant cited her ability to maintain her composure and

accomplish her various duties under a noisy, sometimes confused and high pressure environment. She stated she is able to anticipate the needs of her supervisors, convey a good impression of the office and perform a myriad of tasks within and outside the scope of her position description. The rater and reviewer attested to her adaptability except for instances when she allowed personal problems to interfere with her work. On these occasions the appellant was said to have made repeated threats to resign. Under these circumstances the board was in agreement that the "Satisfactory" rating in this factor was warranted.

7. To sum up, the Board found the appellant's performance to be "Satisfactory" in the factors of "Quantity of Work", "Quality of Work", and "Adaptability". This justifies an overall rating of Satisfactory under the applicable system. The Board unanimously and readily agrees that, under the totality of the circumstances, the appellant stood high in that category.

DECISION

In view of the finding and conclusions discussed herein, it is the decision of the Board of Review, that the annual adjective performance rating of "Satisfactory" was correct and should not be changed.

By Direction of the Board of Review:

/s/ Welford M. Burrell
Welford M. Burrell, Chairman
Performance Rating Board of Review

cc: Board Members
Management Representative
Employee Representative
Regional Director, Philadelphia Region,
U.S. Civil Service Commission

(Note: Appellant does not receive a copy!)

NAVAL SUPPLY CENTER
Norfolk, Virginia 23512

23:PR
16 AUG 1973

Mrs. Lena Rosa K. Conley
300 W. 35th Street
Norfolk, Virginia 23508

Dear Mrs. Conley:

Reference is made to your letter of 7 August 1973.

This command is not involved in any way with the matter of your previous retirement and annuity. Any dispute is solely between you and the U. S. Civil Service Commission.

In reply to your question, nothing adverse appears in your personnel records relative to your conduct or behavior while employed at this activity. Your official personnel folder does contain several official documents relative to your disability* effective 17 February 1967, as well as your application for Federal employment (SF-171) dated 9 July 1971 with attachments which make reference* to your retirement.* I have been advised that you have reviewed your personnel folder on one or more occasions and are probably aware of its contents. However, if desired, your personnel folder is available in the Civilian Personnel Department for your further review until 28 September 1973 at which time it will be forwarded to the National Personnel Records Center.

The official timekeeping records reveal that as of the date of your resignation you had 124 hours of sick leave accrued.**

As requested, your application and college transcript attached to your letter of 18 July 1973 are returned.

Sincerely,

/s/ V. A. Lascara

V. A. LASCARA
Rear Admiral, SC,USN
Commanding Officer

Encl:

(1) Application and college transcript

*No indication of disability was on file. Evidence existed of Contested CSA1002105 and of Civil Service Commission's acceptance of Dr. James J. Cavanagh's opinion of November 12, 1970, that no disability existed when he first saw employee in February 1966 nor at any time thereafter, as "Proof of Recovery" making Government Check of August 2, 1973, for \$12,023.49 possibly fraudulent.

**The Acting Commanding Officer on September 27, 1973, wrote a letter correcting this balance to indicate 132 hours of sick leave remaining.

P.O.Box 6092 (or 300 W.35th St.)
Norfolk, Virginia 23508
August 30, 1974

Mr. William P. Berzak, Chairman
U. S. Civil Service Commission
Appeals Review Board
Washington, D. C. 20415

Dear Sir:

This is in further reference to my protests of August 14 and 27 to the enclosure (letter of July 31, 1974, from Clarice F. Hens, Legal Counsel, OCHM, Department of the Navy) forwarded with your letter of August 1, 1974.

Again the missing enclosure(11) POWERS MEMO FOR RECORD 7/16/73 is requested.

Unable yet to secure a lawyer with expertise and timeto help me, I found one (for whom I did some work) who provided me with a copy of the case referred to in the July 31 letter; i.e., McCormack v. U.S. Ct.Cl. 5/15/74.

Not only was I not informed of proper appeal procedures nor given any exit interview nor advised as to any appropriate assignment, I was deceived by derogatory remark placed on resignation and SF7, indicated by McCormack v. U.S.:

"In this regard, it will be observed that the Federal Personnel Manual, Supplement, 752-1, subchapter S1-2(b)(1) provides: '(b). Involuntary actions. (1) Employee deceived. Agencies should be particularly cautious about assuring an employee that a voluntary separation, as opposed to a removal for cause, will leave his record unblemished.*** Thus, if an employee is

influenced to separate voluntarily because of his agency's assurance that this action will leave him with a clear record in his Official Personnel Folder and if the agency then enters any unfavorable information on the SF 50, the agency has deceived the employee."

The mark constituted an adverse action which was not known by me until viewing the file in September 1973! Remedies should be available for removal.

That my appeal was timely is clearly proved by Gernand v. United States, 188 Ct.Cl. 544, 412 F.2d 1190 (1969) referred to in McCormack v. U.S. where a letter to President Kennedy was sufficient to constitute a timely appeal, and my letter to Congressman Whitehurst on July 17, 1973, in which it was stated that my resignation was forced was written four days after the forced resignation.

On July 12, 1973, I was shouted at and ordered around until I had to visit the Clinic about 2 p.m., where HMC Sullivan calmed me so that I could continue. At 4 p.m. interview for Clerk Stenographer, GS-4, in the Joint Personal Property Shipping Office was offered, but Sandra Ferguson was also going, so I declined in her favor; she was not selected! No honest effort was made to reassign me. Leave Without Pay could have continued without disruption to the work, as Sandra Ferguson was satisfactorily filling my position and a summer employee was filling her former position as Shipment Clerk.

Very truly yours,
Lena Rosa K. Conley
(Mrs. George W. Conley)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

LENA ROSA K. CONLEY)	
300 W. 35th Street)	CA-74-575-N
P. O. Box 6092)	
Norfolk, Va. 23508)	Filed
(Phone 622-4951))	
Plaintiff)	12/27/74
v.)	
FRANCES M. WILSON, Executive)	
Director, Bureau of Economic and)	
Business Affairs, United States)	
Department of State, Washington,)	
D. C. 20025)	
Defendant)	

C O M P L A I N T - - L I B E L

1. This action for libel is instituted by the plaintiff, LENA ROSA K. CONLEY, against the defendant, FRANCES M. WILSON, to recover compensatory and punitive damages for the publication by the defendant in an undated affidavit, Exhibit A, carrying notation "Defendants' Exhibit No. 2" to Defendants' Motion to Dismiss regarding Civil Action No. 74-654, copy of which was sent to plaintiff on October 3, 1974, of defamatory falsehoods with a desire to injure plaintiff and with actual malice, said defendant failing to exercise due care, with the knowledge that the statements were factually false and with gross, wanton, willful, reckless and indifferent disregard of the rights of the plaintiff and of whether the statements were true or false, and said statements conveyed to the reader and imputed to the plaintiff unfitness to perform the duties of an office or to perform useful and efficient service and tend to hold plaintiff in public ridicule and contempt and

occasion to the plaintiff damages to her professional and social reputation, relationships and standing in the community and consequent mental suffering, insult and loss of income.

2. Jurisdiction is founded on Chapter 85 of Title 28, specifically under Section 1332, Diversity of Citizenship, whereas plaintiff is a citizen of the Commonwealth of Virginia and defendant is an officer of an agency of the United States located in Washington, D. C., and Section 1361, Action to compel an officer of the United States to perform his duty.

3. Proof that defendant did not exercise the due care required by statute to avoid such libelous statements was her carelessness in ignoring the facts on file that plaintiff reported for duty (after being cleared by the Bethesda Naval Hospital, as confirmed by Exhibit B, letter of November 1, 1968, of any indication of psychological or psychiatric unfitness for duty) on April 22, 1965, as certified by William E. Cooke and Robert B. Sarsfield in Personnel Evaluation Report, Exhibit C, which shows plaintiff worked less than three months on the GS-4 Clerk-Stenographer desk and then performed work as GS-5 Secretary to the Assistant Chief of REP and GS-8 Secretary doing verbatim reporting for the Bureau of Public Affairs; furthermore, defendant maliciously and falsely states plaintiff requested leave, whereas, when Jules Bassin, upon signing his Memorandum of September 29, 1966, to Dr. Alexander Tish, U.S. Civil Service Commission, Exhibit D, told her she was to be placed involuntarily on Leave Without Pay, plaintiff requested leave to visit

her father who was sick, and upon return to Washington requested that she be restored to duty which was denied. Defendant libelously refers to an alleged disability retirement which has never been accepted as no disability ever existed according to Bethesda Naval Hospital's letter, Exhibit B above, and to Dr. James J. Cavanagh who confirmed this in his letter of January 26, 1971, Exhibit E.

WHEREFORE, the plaintiff moves the Court for Judgment against the defendant in a sum equivalent to last annual salary of \$7,041 from October 11, 1966, to reinstatement July 12, 1971, or approximately \$35,000.00 compensatory damages and in the further sum of \$35,000.00 punitive damages, or for such other, further, and different relief as to the Court may seem just and proper in the premises.

LENA ROSA K. CONLEY

COMMONWEALTH OF VIRGINIA
CITY OF NORFOLK

LENA ROSA K. CONLEY, being duly sworn, deposes and says: That she is the plaintiff herein, and has read the foregoing petition and knows the contents thereof; that the same is true to her own knowledge and belief, except as to the matters therein stated to be alleged upon information and belief, and as to those matters she believes it to be true.

LENA ROSA K. CONLEY
300 W. 35th Street
P. O. Box 6092
Norfolk, Va. 23508
(Phone 622-4951)

COPY

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

Lena R. K. Conley)	Civil
Plaintiff,)	Action
v.)	No.
Robert E. Hampton, et al.,)	74-654
Defendants.)	

AFFIDAVIT OF FRANCES M. WILSON

I, Frances M. Wilson, being duly sworn,
do hereby depose and say:

1. That I am the Executive Director of the Bureau of Economic and Business Affairs, United States Department of State, and, as such, am responsible for the personnel records of this Bureau. The facts set forth in this affidavit are based on my personal knowledge and belief, and on information furnished to me in my official capacity, including information obtained through a careful search of the aforesaid records.

2. The plaintiff herein named was employed by the Bureau of Economic and Business Affairs, United States Department of State, in the Division of Foreign Economic Reporting as an FSS-8 Secretary, assigned to a GS-4 Clerk-Stenographer position from May 24, 1965, to October 4, 1966. Said plaintiff was granted emergency annual leave, at her request, commencing October 5, 1966, and having used up her accumulated leave, was placed on Leave Without Pay, also at her request, on October 11, 1966. This was done pending a decision on her disability retirement by the United States Civil Service Commission. Said disability retirement became effective on February 17, 1967. Said plaintiff's position was filled on November 6,

1966, by a GS-3 Clerk-Stenographer, who remained in that position until June 29, 1968.

Frances M. Wilson

(Copy received had ink notation:
"Defendants' Exhibit No. 2")

EXHIBIT A

NAVAL HOSPITAL
NATIONAL NAVAL MEDICAL CENTER
BETHESDA, MARYLAND - 20014

NH6-08-JED:mef
J-660738
Ser: 2030

1 NOV 1968

Mrs. Lena Rosa K. Conley
1123 Surrey Crescent
Norfolk, Virginia 23508

Dear Mrs. Conley:

This is in reply to your letter of 30 September 1968, requesting an appointment at our hospital.

Your records were reviewed by our Neuro-psychiatric and Surgical staffs, and it is their opinion that from a medical viewpoint you were presumably employable at the time of your discharges from our hospital on 21 April 1965, and on 8 July 1966. However, the latter date was extended to 15 August 1966 by reason of post-operative convalescence. It is also assumed that you were employable on 17 February 1966, in view of the fact that medical records at this activity contain no data which would indicate otherwise.

We feel that the above should be a satisfactory answer to your inquiry, and it will therefore not be necessary for you to seek an appointment as requested.

Sincerely,

/s/ G. H. Tarr, Jr.

G. H. TARR, JR.

Captain, Medical Corps, U. S. Navy
Acting Commanding Officer

EXHIBIT B

A-36

Department of State
PERSONNEL EVALUATION REPORT
Support Staff Personnel
GS 1-8 FSS 10-7
All Secretaries and Wage Board Personnel

Regular
Report

CONLEY, Lena R. K., Mrs. 119847F
FSS-8

E/CBA/Foreign Reporting Division
Clerk-Stenographer
DATE OF ARRIVAL AT POST PERIOD COVERED
5/23/65 5/24/65 - 12/31/65
RATING OFFICER REVIEWING OFFICER
/s/ William E. Cooke Robert B. Sarsfield
William E. Cooke Robert B. Sarsfield
GS-13 GS-14, Assistant Chief,
REP

III

Mrs. Conley has been under my supervision for somewhat less than three months of the review period covered by this report. (She actually reported for duty April 22, 1965.) During the balance of the period she served as secretary to the Assistant Chief of REP. She also performs work for other members of the staff.

During the early days of her assignment to REP, Mrs. Conley tended to become upset under pressure. She has made very effective efforts to overcome this factor during her assignment to REP and is now able to cope with requests from several people at the same time without letting the situation disturb her usual pleasant disposition.

The quality of Mrs. Conley's work, even during the early period of her assignment left little to be desired. She is exceptionally fast and accurate in taking

A-39

dictation and transcribing her notes. Mrs. Conley learns rapidly and is a very conscientious worker. She quickly became acquainted with the files of the office and has, in fact, shown considerable initiative in revamping the files to make material more easily accessible and in weeding out material no longer useful. She has also demonstrated good ability to maintain our records of required economic reports and to prepare necessary statistics.

Mrs. Conley gets along well with her fellow workers and with the officers for whom she works. I understand from Mr. Sarsfield, the Assistant Chief of REP, that she performed well during her detail to the front office.

Mrs. Conley is currently in a GS-4 position which is of a lower class than the FSS-8 rating she holds in the Foreign Service Staff Corps. This has been a matter of concern to her and she has actively sought a position in the Department more nearly in line with her FSS rating. I am pleased to learn that she is currently being considered by the Bureau of Public Affairs for a GS-8 position. She has, in fact, been the responsible shorthand reporter for nine of the thirteen Department of State noon press briefings held thus far this January 1966.

EXHIBIT C

A-40

September 29, 1966

MEMORANDUM

TO: Dr. Alexander Tish, Chief
Medical Retirement Section
Bureau of Retirement and Insurance
U. S. Civil Service Commission

FROM: Employee Relations Staff
Office of the Director General
Department of State

SUBJECT: Application for retirement for
disability submitted on behalf
of Mrs. Lena R. K. Conley,
FSS-8

In accordance with the Federal Personnel Manual, 831, Subchapter 10-7(e), page 33, the following statement is submitted:

This is to certify that Mrs. Lena R. K. Conley was interviewed on the above date by the undersigned. Mrs. Conley's rights and privileges were again explained to her in connection with her retirement. She declined to execute an application for disability retirement voluntarily.

Signed: /s/ Jules Bassin
Chief, Functional Personnel
Program

/s/ Maxine T. Smith
Employee Relations Specialist

EXHIBIT D

A-41

JAMES J. CAVANAGH, M. D.
HEMPSTEAD MEDICAL CENTER
230 Hilton Avenue
Hempstead, N. Y. 11550

Telephone 538-2110

26 January 1971

Dear Mrs. Conley

This letter is to clarify regarding my psychiatric evaluations and conclusions I came to regarding you in 1966, 1967 and 1970.

I did not find psychiatric disability during any of those consultations and, as I previously recommended, in my opinion, retirement for psychiatric disability was not warranted.

Please feel free to make copies of this letter.

Yours truly,

James J. Cavanagh, M. D.

Psychiatrist

Mrs. Lena Rosa Conley
P. O. Box 6092
Norfolk, Va. 23508

EXHIBIT E